

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1342

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1342

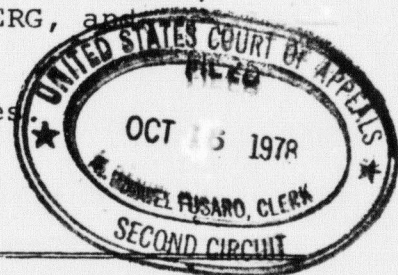
UNITED STATES OF AMERICA,

Appellant,

- against -

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,
PETER S. DAVIS, ALAN E. SANDBERG, and
ERIC BERGE,

Defendants-Appellees



PETITION FOR REHEARING WITH SUGGESTION FOR
REHEARING EN BANC FOR APPELLEE PETER S. DAVIS

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Docket No. 77-1342

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN
BANC FOR APPELLEE PETER S.
DAVIS

Defendant-appellee Peter S. Davis seeks, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, rehearing, with a suggestion for rehearing en banc, of a decision of a panel of this Court (Feinberg, Mansfield and Timbers, JJ.) dated September 14, 1978. Judge Mansfield wrote a separate concurring opinion. The panel reversed an order of the United States District Court for the Southern District of New York (Hon. Charles S. Haight, Jr.) which had dismissed the indictment as to Davis, and other defendants, and remanded the case with a direction to reinstate the unexpurgated indictment.

Preliminary Statement

Appellee Davis respectfully joins in the petition of co-appellees Fields and Sandberg that is being submitted concurrently and adopts all arguments contained therein. To avoid unnecessary duplication, appellee Davis will not repeat those arguments. Rather, this petition will only ad-

dress itself to the "chief issue" on the appeal; (i.e., whether the District Judge abused his discretion in dismissing the indictment because of governmental misconduct) and only insofar as it particularly relates to appellee Davis

**WHY THE PETITION SHOULD BE
GRANTED**

Uncontroverted findings of fact led the District Court to properly conclude that dismissal of the indictment against appellee Davis was the only adequate remedy.

After an eleven-day hearing, the District Court made extensive findings of fact that were unchallenged by the Government on appeal and not found to be clearly erroneous. However, the Panel glossed over these findings and failed to adequately deal with the well-documented and unchallenged misconduct committed by the SEC attorneys and the consequent irreparable harm suffered by appellee Davis.

The District Court's findings of fact are set forth in the petition of co-appellees. In addition, the District Court found specifically as to appellee Davis that:

1) Davis resisted the settlement terms demanded by the SEC. His resistance was only overcome by his attorney's advice that the SEC had agreed there would be no criminal reference if the settlement was entered into. (District Court Opinion, Finding 28 at 91,841-91,842).*

2) At the time the SEC staff attorney made the criminal reference, he knew that the avoidance of a criminal

*The District Court's opinion is reported at '77-'78 CCH Fed. Sec. L. Rptr. ¶96,074 (S.D.N.Y. June 3, 1977). References to that opinion are to the CCH report.

reference was the only objective for Davis in entering into the civil settlement (District Court Opinion, Finding 35 at 91,843).

3) As one of the terms of the consent judgment, Davis "consented to the most severe administrative sanction available to the SEC, a lifetime resignation from practice before the SEC, as a result of which Davis was forced to resign from the law firm he had built up, which specialized in SEC practice, and was forced to give up the practice of law." He has not practiced law for almost three years. (District Court Opinion, Finding 36, Text and N.2 at 91,843-91,844).

The destruction of appellee Davis' legal career came as a "direct consequence" of the fraudulently induced civil settlement. (District Court Opinion at 91,850). The District Court specifically found that merely setting aside the civil settlement could not restore Davis to the law practice he lost. His old firm could not be directed to take him back as senior partner. Lost clients could not be compelled to once again retain Mr. Davis as their counsel. Mr. Davis' reputation could not be restored by court order. As SEC Commissioner A.A. Sommer, Jr. aptly stated:

"All of us know of the dramatic and unfortunate impact any litigation questioning the conduct of a professional can have on his career, as well as his finances. Corporations can withstand legal attacks and go forward to thrive and not infrequently corporate executives can do the same. However, it is far more difficult for a professional to retain his community standing, his self-respect and his financial security after questions have been raised publicly concerning

his integrity or his competence." (A.A. Sommer, Jr., The Emerging Responsibilities of the Securities Lawyer, January 24, 1974, at 13). (Emphasis supplied).

Quite plainly, it was reasonable for the District Court to conclude that the harm Davis suffered as a direct result of the wrongful governmental conduct dictated that a sufficient sanction be imposed and that Davis was entitled to the "benefit of the bargain."* The District Court acted well within its sound discretion in holding at least as to Davis that dismissal was the only proper remedy.

CONCLUSION

For the reasons stated herein and in the petition of co-appellees, rehearing, and rehearing en banc, should be granted.

DATED: New York, New York
October 16, 1978

Respectfully submitted,

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*The SEC's misconduct here was not an isolated instance as the Panel's opinion states. See United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975).

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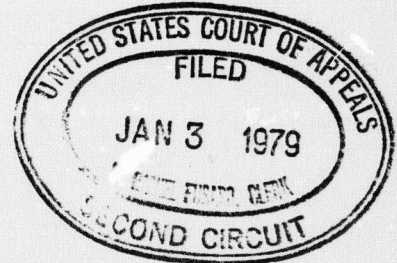
UNITED STATES,

Plaintiff,

v.

DOUGLAS P. FIELDS, et al.,

Defendants.



Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM OF THE SECURITIES AND EXCHANGE
COMMISSION, AMICUS CURIAE, IN RESPECT TO
THE PENDING PETITIONS FOR REHEARING

This memorandum is respectfully submitted on behalf of the Securities and Exchange Commission ("Commission"), which previously filed an amicus curiae memorandum in this case on December 19, 1977, at the request of the Court. This memorandum is submitted in respect to the pending petitions for rehearing and rehearing en banc, and in particular with respect to claims in those petitions concerning certain apparent inaccuracies in the Court's September 14, 1978, opinion regarding the Commission's procedures. See Petition of Appellees Friedman and Berge, pages 1-19; Petition of Appellee Fields, pages 3-10; see also, letter of October 10, 1977, from Robert B. Fiske, Jr., United States Attorney.

For the reasons stated herein, the Commission believes that it would be appropriate for the Court to correct certain technical inaccuracies in its

opinion, none of which, it is submitted, should affect in any manner the result reached by the Court. A short discussion of the relevant background may be helpful to the Court's consideration of the specific modifications which the Commission would propose.

BACKGROUND

As the Court noted at page 4724 of its slip opinion, shortly after members of the Commission's staff learned of the matters which formed the basis of the Commission's injunctive suit and the subsequent indictments, the Commission entered, on February 19, 1975, a formal order of investigation. An investigation was conducted, and a number of discussions regarding a possible settlement of the Commission's civil action were held with the defendants; the Commission's suit was filed on September 16, 1975. ^{1/} The individual defendants signed consents to the entry of permanent injunctions, and final judgments were entered against them by the district court.

As this Court further noted, at about the same time the Commission's injunctive suit was filed, Commission employees "were in touch with the United States Attorney's Office * * * on the subject of a prospective criminal reference of the TDA matter." Slip op. 4725 (emphasis added). This communication was, as the Court recognizes, a preliminary contact, not a formal or informal criminal reference. On December 1, 1976, the same day a settlement discussion with respect to the injunctive proceeding was held with the defendants, one of the members of the Commission's staff telephoned the Assistant United States Attorney about the case, and, on the same date, sent a letter

^{1/} Securities and Exchange Commission v. TDA Industries, Inc., et al., 75 Civ. 4519-LWP.

to the Assistant United States Attorney enclosing the pleadings which had been filed in the injunctive action. The Court characterizes this as an "informal criminal reference" (slip op. 4726); as the Commission used the term in its amicus curiae brief, however, an "informal criminal reference" is a Commission-authorized referral of files, including non-public investigatory material, to the United States Attorney at the request of the latter. Commission Br. at 11. As we pointed out, such an "informal criminal reference" is generally done by the Commission without recommending that any action be brought or that particular persons be named as defendants. Id. The communication which occurred on December 1, 1976, was not such an "informal criminal reference," however, because it involved only further preliminary communications and the forwarding of publicly available materials. These types of communications do not require express Commission authorization, and no Commission authorization was sought or obtained.

As noted in the Court's opinion, after the December 1, 1976, communication between the Commission's staff and the United States Attorney's Office, "There followed an investigation of the TDA matter by the United States Attorney's Office, presentation of the case to a grand jury, and the return of the instant indictment on November 8, 1976." Slip op. 4727.

DISCUSSION

After setting forth an accurate factual description of the case (slip op. 4718-4727), the Court's preliminary discussion of the Commission's procedures (slip op. 4727-4732), which precedes its discussion of the "chief issue in the case" (slip op. 4732-4740), contains what appear to be two

different types of characterizations that are not technically accurate:

(1) The Commission's formal investigation is at several points described as an informal investigation. In fact, the informal investigation of the TDA matter covered the period from January 14, 1975, when the staff first learned of the matter, to February 16, 1975, when a formal order of investigation was entered by the Commission. After the entry of such an order, the Commission designates an investigation as "formal."

(2) As noted supra, the Court at several points refers to the communications between the Commission's staff and the United States Attorney's Office on December 1, 1975, as an "informal criminal reference." As the Commission uses the terms, however, both a formal and an informal criminal reference require Commission authorization. See Commission Br. 11-12. Rather, the December 1, 1975, contact was in the nature of "preliminary communications between the Commission's staff and the offices of the United States Attorney," which the Commission fully described at pages 8-10 of its amicus brief.

As set forth in detail in the Commission's brief, it has long been the Commission's policy to encourage its staff to bring to the attention of the United States Attorneys, at the earliest possible stage of an investigation (whether formal or informal), activities in which the staff believes a United States Attorney may have an interest. This is done in order to facilitate an early determination by the United States Attorney with respect to whether he may have an interest in pursuing a particular matter, and thereby to expedite the process by which a case may be brought before the grand jury. As we pointed out at pages 8-9 of our brief, and as the Court noted at page 4731 of its opinion, these procedures help the United States Attorney avoid

statute of limitations problems, while at the same time protecting the interests of a particular defendant in a speedy criminal trial. In view of these important interests served by the Commission's policy, this Court cited the Commission's procedures respecting this type of communications as a "commendable example of intra-agency cooperation," and both this Court and the district court declined to interfere with those procedures and working relationships. See United States v. Fields, [1977] OCH Fed. Sec. L. Rep. ¶96,074 at p. 91,848 (S.D. N.Y. 1977). 2/

These preliminary communications, which do not rise to the level of a formal or even an informal criminal reference, may, as we pointed out, assume a variety of forms, including regular discussions or inquiries made from time to time regarding pending matters, or the forwarding of relevant publicly-available documents, including court pleadings or documents filed with the Commission. In addition, as a separate matter, the Commission's staff is authorized to disclose non-public information to other law enforcement authorities whenever its investigation is an informal one, as the Court noted at page 4730 of its opinion.

In view of the above facts, the Commission respectfully suggests that the Court's opinion be modified at several points. First, the following modifications to the Court's various references to the December 1, 1975, communication between the Commission's staff and the United States Attorney's Office would appear appropriate.

2/ The district court also referred to these informal communications as an "informal criminal reference," apparently giving a different meaning to the term than the meaning which the term has at the Commission. OCH Fed. Sec. L. Rep. at p. 91,848.

(1) At page 4726, lines 10-13, it is stated that "Tucker had made an informal criminal reference of the TDA matter to the United States Attorney's Office on December 1, as stated below." To avoid the implication that this "reference" was the "informal criminal reference" described in the Commission's amicus brief, which, as explained above, it was not, it is suggested that the phrase be modified to read: "Tucker had communicated with the United States Attorney's Office concerning the TDA matter on December 1, as stated below."

(2) At page 4726, lines 26-27, the phrase "made an informal criminal reference of the TDA matter to Assistant United States Attorney Wing" appears. For the same reasons stated above, it is suggested that the phrase be modified to read: "communicated with Assistant United States Attorney Wing regarding the TDA matter."

(3) At page 4727, lines 7-9, the phrase "the informal criminal reference of this case by the SEC to the United States Attorney's Office" appears. For the same reasons stated above, it is suggested that this phrase be modified to read "the communications regarding this case by the Commission's staff to the United States Attorney's office."

In addition, the following modifications to the Court's references to the nature of the Commission's investigation of TDA would appear warranted:

(1) It is suggested that the final sentence which appears at pages 4727-28, beginning "It is important * * *" might be amended to read:

"It is important to bear in mind the distinctions, under SEC procedure, between preliminary communications between the Commission's staff and the United States Attorney's office, which may occur in the context of either a formal or informal investigation, and Commission criminal referrals, which may in turn be either formal or informal."

(2) On page 4728, lines 4-5, the words "which was utilized in the instant case" should be deleted, as should the words "(not utilized here)" which appear at line 9 of this same page.

(3) On page 4731, lines 5-6, it is respectfully suggested that the phrase "at an early stage of an investigation, that is, during an informal or preliminary investigation" be modified. As noted, the preliminary communications referred to earlier in this paragraph may take place in the context of either a formal or informal investigation, whenever matters of mutual interest to the Commission and the United States Attorney are involved. See Commission Br. at 8-9. In the instant case, the communications occurred in the context of a formal investigation. The Commission would suggest, therefore, that the phrase quoted above would more appropriately read "at an early stage of either a formal or informal investigation." The next three sentences in this paragraph contain inaccuracies of the type already discussed, and it is respectfully submitted that they may either be amended as deemed appropriate by the Court, or deleted as unnecessary to the sense of the paragraph. As the final sentence of the paragraph points out, the district court declined to invalidate the Commission's procedures with respect to cooperative communications with the United States Attorney, a holding this Court found to be entirely correct. The following paragraph (beginning "As the SEC points out * * *") is a continuation of the discussion of the nature of the preliminary communications between the Commission and the United States Attorney (see Commission Br. 8-9), not, as the sentence might be read to indicate, informal investigations or informal criminal references. It is suggested that this can be clarified by modifying the first sentence of this paragraph to read: "As the SEC points out in its amicus brief, the

procedure permitting preliminary communications with the United States Attorney has significant advantages."

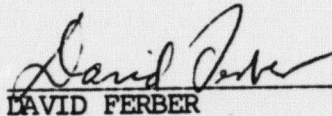
* * * * *

As we noted earlier, we do not believe that the discrepancies in the Court's description of the Commission's procedures should affect the Court's decision. As the Court pointed out at page 4732, the description of the Commission's procedures was merely preliminary to its consideration of "the chief issue in this case—whether the district court in this criminal action abused its discretion in dismissing and striking substantial portions of the indictment because of alleged misconduct by employees of the SEC in attempting to settle the civil action." Slip op. 4732, footnote omitted, emphasis in original. The "misconduct" found by the district court—findings that were not challenged in this appeal—concerned the failure to disclose the contacts the Commission's staff had had with the United States Attorney's Office, in circumstances in which the staff's silence might have been construed as an indication that no criminal action would be filed. Slip op. 4734. As the Court noted, however, this "misconduct" resulted in no harm to the defendants at the time it occurred, since the defendants "with their backs to the wall because of the New York County District Attorney's anticipated reference of the matter to the SEC, had long since disclosed enough facts to the SEC to enable the government to marshal the evidence and to proceed both civilly and criminally against them." Id. The precise nature of the Commission investigation, or the staff's communications with the United States Attorney's Office on December 1, 1975, or any other date, should not alter the Court's conclusion with respect to the chief issue in the case.

CONCLUSION

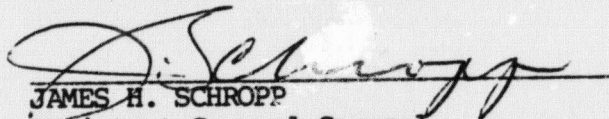
The Commission appreciates this opportunity to apprise this Court concerning the above matters. It is respectfully submitted that the modifications suggested herein will correct internal inconsistencies in the Court's opinion which, while not affecting the result reached herein, might have led to confusion with respect to the Commission's investigatory and criminal reference procedures.

Respectfully submitted,



DAVID FERBER

Solicitor to the Commission



JAMES H. SCHROPP

Assistant General Counsel

Securities and Exchange Commission
Washington, D.C. 20549

December 22, 1978

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRIS L. WASHINGTON, being sworn says: I am not a party to the action, am over 18 years of age and reside in Orange, New Jersey.

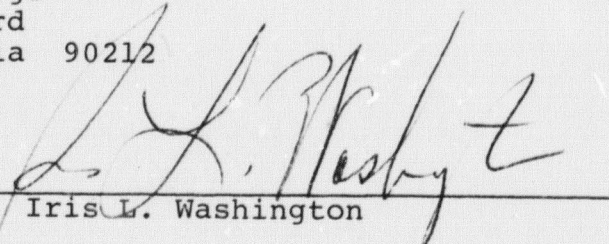
On October 16, 1978, I served two true copies of the annexed Petition for Rehearing of Defendant-Appellee Peter S. Davis by mailing the same in a sealed envelope, with postage pre-paid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressees as indicated below:

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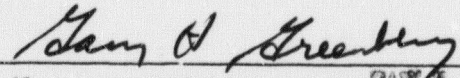
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Iris L. Washington

Sworn to before me this
16th day of October, 1978.


Notary Public

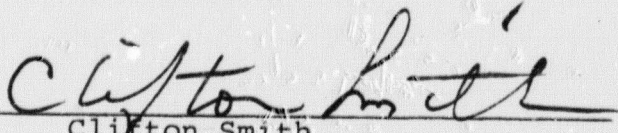
GARY A. GREENBERG
Notary Public, State of New York
No. 31-4609424
Qualified in New York County
Commission Expires March 30, 1979

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CLIFTON SMITH, being sworn says: I am not a party to the action, am over 18 years of age and reside in New York, New York.

On October 16, 1978, I personally served two true copies of the annexed Petition for Rehearing of Defendant-Appellee Peter S. Davis upon:

Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America
One St. Andrew's Plaza
New York, New York 10007


Clifton Smith

Sworn to before me this
16th day of October, 1978.


Notary Public

GARY H. GREENBERG
Notary Public, State of New York
No. 31-4609434
Qualified in New York County
Commission Expires March 30, 1979